criterion has been challenged and alternative ownership-management evidence has been offered and rejected.[7] One is the application of the Georgia Public Telecommunications Commission (Georgia Public) for an FM station in Roswell, Georgia, enabling it to provide service to much of the Atlanta metropolitan area. Georgia Public, being a state agency, does not have ownership as such. The members of the agency are appointed by the Governor and reflect diverse backgrounds and credentials. It is obviously not possible for the individual governing members of the agency to assume full time management positions at this particular radio station, nor would that make any sense. They, and the professional broadcasting management staff which they employ, as state officials and civil servants, have a statutory duty to operate the agency's broadcast properties to serve the citizens of Georgia. The professional broadcasting management staff includes long-time employees of the agency and, in fact, some are local residents of the service area of this particular station. So are some of the governing members. This agency owns and operates a number of other radio and television stations throughout the state. It has done so continuously for approximately 30 years.

During that 30-year period, Georgia Public has built or acquired radio and television stations, improved and expanded those stations, and developed programming service to fulfill needs of the

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[7] The descriptions in the text are taken from evidence offered, but rejected, in FCC comparative hearing proceedings involving these two cases. That evidence is contained in the Joint Appendix, for Georgia Public at JA 103-25 and for Mr. Barger at JA 126-30.

citizens that are not being fulfilled by commercial stations which are driven by support from advertising and the related influence of mass audience appeal and ratings of their programs. In the 30 years of its operation, this agency has never sold a single one of its radio or television stations. This has been permanent ownership and management to serve the public interest in the fullest sense of that word as used in the Commission's 1965 Policy Statement regarding its expectations of the duration of integration of ownership and management on which broadcast permits are to be assigned. Evidence of all of these facts was excluded by the Commission even though -- judged by any fair standard -- it is enormously more persuasive evidence of the likelihood of effectuation of program service in the public interest over a meaningful, long-range time period than the "integration" evidence which the Commission received and relied on in awarding the permit to one of the other applicants. Georgia Public's appeal from the Commission's decision, including its challenge of the integration criterion as applied to its application, is currently pending before this Court in Mazo Radio Co. v. FCC, No. 92-1659 and consolidated cases.

The other such case is the application of John W. Barger for a new FM station in Haltom City, Texas, located in the vicinity of Dallas and Fort Worth. Mr. Barger, likewise, has challenged the integration criterion as applied to his application and has offered evidence (rejected by an FCC ALJ while accepting "integration" evidence) of likelihood of effectuation of program service in the public interest based upon a lifetime career in radio broadcasting that includes experience as the general manager of a radio station in the Dallas-Fort Worth radio market, as the general counsel of a major group broadcaster, as the chief operating officer of another major group broadcaster, and as a leader in radio broadcast industry trade and professional associations. Mr. Barger's application is currently pending in a hearing proceeding before the ALJ in the matter of Madalina Broadcasting, Inc., et al, MM Docket No. 91-100.

SUMMARY OF ARGUMENT

The FCC launches its defense of the integration criterion on the erroneous premise that the private citizen in this case, Mrs. Bechtel, had the burden of showing that changed circumstances have rendered the criterion unreasoned, arbitrary and capricious. While Mrs. Bechtel has marshalled evidence and arguments to that effect, the burden rests on the FCC to show a rational link between the integration criterion and the public interest objective for which it is used, i.e., as a predictive tool to determine the likelihood of effectuation of programming service in the public interest, and to show that the agency is not "blind" to the faults and failings of the criterion. American Horse Protection Association, Inc. v. Lyng, 812 F.2d 1, 7 (D.C.Cir. 1987).

The evidence and arguments are massive that the integration criterion is unreasoned, arbitrary and capricious: (1) It is based on vague and subjective concepts under which decisions turn on minutiae. (2) A two-tiered ownership structure encourages "sham" integration schemes by permitting a moneyed party to provide the funding (claiming to be a passive investor) and another party having desirable "FCC traits" to claim to be the controlling owner-manager. (3) The criterion discourages applications by broadcast professionals, encourages applications by newcomers to the industry, but requires the newcomers to promise to be the full time managers in control of the broadcast station, a blue print for disaster in today's highly competitive broadcasting industry. (4) The criterion calls for parties to commit to long-term ownership integration, described by the FCC as "permanent;" however, FCC rules and practice, in fact, permit the winning applicant to sell the station after a period of only one year. (5) Many new stations can be sold for amounts far exceeding the cost of acquiring the license, building and operating them for a period of one year. (6) Under all of these conditions, the integration criterion is designed (almost guaranteed) to generate initial licensees of broadcast stations who will sell the stations just as soon as they can. There is, therefore, no lasting impact on the public interest from the selection of initial station licensees using the integration criterion.

The FCC's defense of this regulatory program is as <u>anemic</u> as the case against it, just described, is strong: (1) The premise underlying the integration criterion, i.e., that an owner who manages his or her own station is more likely than any other owner to provide program service in the public interest, is an assumption made by the FCC some 45 years ago. (2) There is no evidence that the FCC has ever conducted any studies during the past half century to determine whether this assumption has any validity in actual practice in the real world of broadcasting, such as a comparison of the program service in the public interest of stations managed by the owners themselves with the program service in the public interest of stations having professional managers hired by the owners, examples being the stations of all group owners in the nation. (3) Amazingly, the FCC has never conducted studies of its own ownership records (or solicited information from its broadcast licensees) to determine that integration promises as made in the hearing rooms have been carried out by the winning applicants. (4) Thus, the FCC has never conducted studies to determine if the integration criterion has in fact achieved increased ownership of stations by persons having desirable "FCC traits." (5) In this brief, Mrs. Bechtel cites two comparative cases involving appeals to this Court in which the integration criterion failed to fulfill its objective, i.e., Debra S. Carrigan, supra, in which the winning applicant after five years of litigation to secure the station contracted to sell her station after only five months of operation, and Cleveland Television Corporation v. FCC, 732 F.2d 962 (D.C.Cir. 1984), in which the party who won the permit after six years of litigation, only a few days after the one-year anniversary date of station operations, filed an application to transfer control of the station from the "active" party whose integration had been the basis for winning the permit to the "passive" party whose commitment to be removed from the management had been essential to the decisions of the FCC and this Court, which transfer was approved by the FCC and the passive party thereupon assumed the position of President, CEO and 51% voting stockholder of the station. (6) Throughout the years of litigation of this case, Mrs. Bechtel has challenged the FCC and opposing parties to provide illustrations of "integration success stories," i.e., cases in which the promised integration has been carried out for a long-term period of time in excess of the one year minimum requirement. Not a single such success story has been disclosed in this litigation, or in the FCC rulemaking proceeding in which the entire industry was invited to comment on the integration criterion.

The initiation of a rulemaking proceeding relative to the integration criterion does not resolve the issue in this appeal. The results of that proceeding, if any, will not apply to the application of Mrs. Bechtel, who is entitled to a favorable adjudication in this litigation lest the decision that the integration criterion is unreasoned, arbitrary and capricious be dicta to her as the moving party in the very case in which that decision is made. James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439 (1991). This matter should be remanded to the FCC for a full and fair comparison of the ownership, management and coverage proposals of Anchor and Mrs. Bechtel, unencumbered by any of the assumptions and premises of the discredited integration criterion.

ARGUMENT

I. The FCC is in error in its position that Mrs. Bechtel has the burden of showing the integration criterion no longer serves the public interest.

This FCC position is set forth in its first remand decision, 7 FCC Rcd. at 4567, 4569 (¶¶12, 14 and n. 6), citing American Horse Protection Association, Inc. v. Lyng, 812 F.2d 1, 7 (D.C.Cir. 1987); WWHT, Inc. v. FCC, 656 F.2d 807, 817-18 (D.C.Cir. 1981); and Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38-39 (D.C.Cir. 1974). None of these cases supports this erroneous position.

In the American Horse decision, this Court took the relatively rare action of holding a refusal to initiate a rulemaking proceeding to be arbitrary and capricious in circumstances where the Secretary of Agriculture declined to act on evidence in his possession that existing regulations did not protect horses against injury as required by a federal statute. While some of that evidence was developed by parties outside the agency, nowhere in the decision is it held that those outside parties had the burden of showing the existing regulations to be inadequate. To the contrary, this Court held that the Secretary of Agriculture had failed to provide a reasonable explanation of his refusal to initiate the rulemaking proceeding and that he was "blind" to his obligation under the law. So, too, here, the FCC has failed to provide a reasonable explanation of its continued use of the integration criterion and its "blindness" to the faults of that criterion (faults which the FCC has itself acknowledged, but not in this particular case).

In WWHT (upholding the FCC's decision not to initiate rulemaking to require cable systems to carry pay-TV television stations) this Court did not say that the FCC could make rulemaking judgments without supporting evidence, as the FCC's first remand decision asserts, 7 FCC Rcd. at 4567 (¶14). To the contrary, in the very passage cited by the FCC, WWHT holds that the agency must provide "an articulated justification" that makes a "rational connection between the facts found and the choice made." 656 F.2d at 817. This is the agency's duty, not the duty of a citizen dealing with the agency. Here, the FCC has failed to articulate a rational connection between the demonstrated faults of the integration criterion, the absence of evidence of the efficacy of the integration criterion and the FCC's blind insistence on continuing to use it.

In Pacific Gas (declining to review an FPC policy statement regarding dealing with a natural gas shortage), this Court did say, as indicated in the FCC's first remand decision, 7 FCC Rcd. at 4569 (n. 6), that a general statement of policy, not adopted based on public comment as in a rulemaking proceeding, must be supported by the agency de novo when it is applied to a given fact situation. 506 F.2d at 38. The FCC's 1965 Policy Statement endorsing the integration criterion was not adopted based on public comment. In light of the Commission's citation to this decision with approval, this is a clear admission by the agency that it has a duty to support the use of its integration criterion de novo in this and other contested cases, something it has made no effort to do.

II. While not having the burden to do so, Mrs. Bechtel has shown that the integration criterion no longer serves the public interest.

While the FCC's first and second remand decisions purport to support the integration criterion and say that Mrs. Bechtel has failed to undermine it, 7 FCC Rcd. at 4567-68 (¶¶14, 21), 8 FCC Rcd. at 1676 (n. 11), the Commission's contemporaneous rulemaking notice makes repeated concessions regarding problems with the integration criterion described at pages 5-7, mirroring the arguments of Mrs. Bechtel, and also makes the following critical admission:

> While records compiled in these earlier proceedings amply demonstrate the flaws in the system, they did not result in reform of the comparative criteria themselves. 7 FCC Rcd. at 2671, n. 5.

A. Mrs. Bechtel has asserted in specific detail that the integration criterion has become so vague and subjective that it no longer constitutes reasoned decision-making, and in the rulemaking notice the FCC conceded that this is a problem with the criterion.

In our brief in Bechtel v. FCC, JA 223-25, we stated that the integration criterion has led to a massive volume of case law with artificial distinctions and ground rules which are exceedingly difficult to comprehend. For example, 100% integration will be compared to 90% integration, but will not be compared to, say, 85% or 80% integration, even though all such percentages amount to controlling interests. The New Continental Broadcasting Co., 88 F.C.C.2d 830 (Rev. Bd. 1981); Cannon Communications Corp., 101 F.C.C.2d 169 (Rev. Bd. 1985). Limited partners cannot communicate with general partners concerning any of the details of station operation which they (the limited partners) are funding -- usually in the entirety or nearly so. Ownership Attribution, 58 Rad. Reg.2d (P&F) 604 (1985). Nonvoting stockholders may put up all of the funds to prosecute the applications, construct the station and finance station operations, but it is vital that a voting stockholder (having no personal investment) open and maintain the corporate bank account, speak to the tower owner about renting space for the antenna and perform other ministerial chores (under expert legal guidance) during the short period of time in which the FCC application is prepared. E.g., Coast TV, 5 FCC Rcd. 2751 (1990).

Integration that is imbued with mala fides will be disallowed altogether; integration that is merely "defective" will be partially accepted and partially disallowed. Susan S. Mulkey, 3 FCC Rcd. 590 (Rev. Bd. 1988). Forty hours a week integration is decisionally superior to 35 hours a week integration. The difference between the two is calculated arithmetically by a formula analogous to something called the Hirschman-Herfindahl Index. Omaha TV 15, Inc., 4 FCC Rcd. 730, 734 (1988). Integration as a "business manager" is credited, integration as an "office manager" is not. Compare Grand Broadcasting Co., 36 FCC 925 (1964) and the 1965 Policy Statement, supra, with, e.g., Payne Communications, Inc., 1 FCC Rcd. 1052 (Rev. Bd. 1986); Doylan Forney, 3 FCC Rcd. 6330 (Rev. Bd. 1988). An individual licensee of a daytime AM station will receive a comparative credit if he or she files for a local FM permit as an individual, but will receive a comparative demerit if he or she files for a local FM permit through a wholly-owned corporation. FM Channel Assignments (Increased Availability), 101 F.C.C.2d 638 (1985), on reconsideration, 59 Rad. Reg.2d (P&F) 1221 (1986). The case discussion of spousal attributions for purposes of integration is convoluted, confusing and unstable. E.g., Absolutely Great Radio, Inc., 92 F.C.C.2d 1183, (ALJ 1982), reversed, 92 F.C.C.2d 1171 (Rev. Bd. 1983), reversed, 95 F.C.C.2d 1023 (Commission 1983), recon. denied, 56 Rad. Reg.2d 251 (1984), reversed, sub nom. Ventura Broadcasting Co. v. FCC, 765 F.2d 184 (D.C. Cir. 1985), decision on remand, 104 F.C.C.2d (1986).

And so on. Each case depends on the overall factual mosaic, viewed largely in subjective terms. Objective standards and customary legal discipline are difficult to apply to the process. Rulings by different ALJs vary. The Review Board often reverses their initial decisions. The Commission reverses the Review Board with some frequency. The fine points of the case law are continually shifting, sometimes in far reaching ways, and often the changed case law is applied retroactively to applications that were filed when earlier case law was in effect. These uncertainties render comparative license cases a highly risky and speculative legal process that places the parties and the FCC beyond the bounds of reasoned agency decision-making. Motor Vehicle Manufacturer's Association v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983).

The brief which the government filed in Bechtel v. FCC, JA 175-210, did not address these specific charges regarding the integration criterion. Nor does the FCC's first remand decision.

Nor does the FCC's second remand decision. But the FCC's contemporaneous rulemaking notice does, and essentially agrees with them. The Commission there states:

> ...our experience with some of these criteria over time raises questions of whether these criteria have become too subjective and imprecise to be used effectively in the public interest. 7 FCC Rcd. at 2664 (¶2).

The Commission also states:

> Comparative hearings, in which these criteria are applied, tend to be protracted and have often turned on relatively slight distinctions among the applicants. Id.

B. Mrs. Bechtel has asserted in specific detail that the confluence of (i) two-tiered integration structures and (ii) the absence of enforcement of any long-term ownership by winning applicants have rendered the integration criterion devoid of any lasting impact on the public interest; in response, the FCC has engaged in unconvincing "double-talk".

Our brief in Bechtel v. FCC, JA 225-28, stated that when the Commission adopted the Policy Statement in 1965, there may have been grounds for expecting that "ownership integration" would be carried out on an ongoing and meaningful basis. At that point in time the Commission had a very strong policy against trafficking in broadcast licenses. Applications for Voluntary Assignments or Transfers of Control, 32 FCC 689 (Commission 1962) (adopting three year minimum holding period); see numerous case adjudications before the Commission and in the Courts, supported by Congressional leaders, examples of which are cited in the Concurring Statement of Commissioner Rivera in Transfer of Broadcast Facilities, 52 Rad. Reg.2d (P&F) 1081, 1092 (Commission 1982). The Commission's expectation was that its licensees would hold the broadcast licenses and operate the stations on a long-term basis. Moreover, two-tiered applications had not yet come into vogue, offering the ability for one party to claim integration credit and another party to fund the venture, an FCC-inspired shot-gun marriage of the most tenuous kind, guaranteed to disintegrate in the early stages of operation, if indeed it ever got off the ground at all.

Then, in 1981, two-tiered integration structures were approved by the FCC in Anax Broadcasting, Inc., 87 F.C.C.2d 483, an invitation, accepted by many parties, to propose phony integration schemes with one allegedly "active" party fronting an application using another allegedly "passive" party's money. In 1982, the Commission abolished its strong policy against trafficking in licenses, permitting sales and purchases of broadcast properties without any holding period requirement or an anti-trafficking policy of any kind. Transfer of Broadcasting Facilities, supra. This inaugurated an era of licensee stewardship in which broadcast licenses are bought and sold like grain futures. The current "grain futures" era of licensee responsibility is illustrated by such activities in the past decade as the purchase, dismantling and resale, for billions of dollars of profits, first of the Wometco chain of radio and television stations (built over a 30 year period), then of the Storer chain of stations (also built over a 30 year period), all in the space of several years, by an entity (Kohlberg, Kravis, Roberts & Co.) whose sole line of business is to buy and sell corporations for rapid turnover profits. See, Wometco Enterprises, Inc., 55 Rad. Reg.2d (P&F) 1545 (1984); Storer Communications, Inc., 61 Rad. Reg.2d (P&F) 454 (1986).

In today's regulatory environment, in 80-90% of the cases the Commission's integration policy does not become a factor in the ultimate selection of the licensee because of settlement of the case.[8] In those cases where the Commission's integration policies are a factor in the selection of the licensee, the period of integrated ownership of the station relied upon by the Commission in selecting that licensee may be changed by the licensee at will after a period of one year. 47 C.F.R. §73.3597(a)(1). A strong motive exists for the licensee to sell the property at the end of the first year. For one thing, broadcast properties often have a market value substantially in excess of the cost of acquiring the licenses and building and operating the station for a period of one year, and a quick profit can be made at the end of that first year. For another thing, by and large integration proposals are unnatural concepts at odds with the real world of operating broadcast stations. In the real world of operating broadcast stations, if management of day-to-day operations is truly placed in the hands of a person without previous broadcast experience who does not turn the station over to a professional general manager, in today's high-tech broadcasting and in competition with savvy existing radio operators, this can be a disaster. One year of that experience is likely enough.

The brief which the government filed in Bechtel v. FCC, JA

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[8] Percentage based on FCC study reported in Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 5 FCC Rcd. 4050 (1990).

175-210, did not address these specific charges regarding the integration criterion. Nor does the FCC's second remand decision. The FCC's first remand decision, 7 FCC Rcd. at 4567 (¶14), attempts to sound reassuring:

> We recognize, as Bechtel suggests, that this rationale would be subverted if nominally passive investors were able to control applicants receiving integration credit and thereby manipulate the comparative process to their advantage. Bechtel has presented no basis for concluding that this is the case. To the contrary, we vigorously enforce the control requirement [footnote omitted]. We do not hesitate to deny integration credit proposals that we find unreliable or made in bad faith [citing the Evergreen and Royce cases, discussed supra and infra].

Keep in mind we are talking about the astonishing proposition that passive investors who usually put up all of the money for the venture are then going to turn the venture over, with no strings attached, usually to someone who does not remotely possess the real world credentials to manage a broadcast station. According to the FCC, a private citizen like Mrs. Bechtel (without subpoena powers or the regulatory ability to make inquiries of broadcast licensees) is supposed to develop evidence in various individual cases that this isn't the way it has actually happened before the FCC has any duty to consider the validity of a concept so outlandish on its face.

In all events, the FCC is speaking out of both sides of its mouth. Compare the reassuring statements just quoted in defense of the integration criterion with the following statements made in the FCC's contemporaneous rulemaking notice:

> The difficulties with this process are exacerbated by the possibility that the comparative criteria may unduly lend themselves to manipulation by the applicants. 7 FCC Rcd. at

> 2664 (¶2).

And,

> Moreover, the integration criterion provides an incentive for applicants to fashion proposals which may not realistically be effectuated -- what the court, in Bechtel, referred to as "strange and unnatural" business arrangments. Ibid. at 2665 (¶15).

And, citing the ubiquitous Evergreen and Royce cases, the Commission states:

> Examination of potentially unreliable proposals can be a time-consuming and uncertain process. Id.

The Evergreen and Royce cases merit some attention. One should start with a leading case, KIST Corp., 102 F.C.C.2d 288 (1985), aff'd without published opinion sub nom. United American Telecasters v. FCC, 801 F.2d 1436 (D.C.Cir. 1986), in which the FCC held one integration scheme to be a sham and upheld another integration scheme as acceptable, in each instance based upon the factual mosaic, and in which the Commission established a principle that it would not regard the source of funding per se to be a controlling party. Pertinent in the factual mosaic was whether the so-called passive party was active in fact, and whether the so-called active party was passive in fact.

That was in 1985-1986. In 1988 the Commission decided the case of Victory Media, Inc., 3 FCC Rcd. 2073, in which the ALJ and the Review Board in reliance on KIST had rejected an applicant's integration because the allegedly passive party had been active, inter alia, in securing funding for the venture at a time when his role was supposed to be passive. The Commission reversed, accepted this integration proposal and granted the application in question, again on the overall factual mosaic, indicating that this was consistent with KIST.

That was in 1988. In 1990 the Commission decided the case of Coast TV, 5 FCC Rcd. 2751. The ALJ granted the permit to an applicant whose passive party had taken an active role similar to that accepted by the Commission in Victory Media, fully accepting that applicant's integration. The Review Board reversed the ALJ, and the full Commission affirmed that reversal. In the text of its decision, the full Commission overruled Victory Media for the "inadvertent suggestion" that the involvement by a passive owner did not reflect adversely on the integration proposal. The Commission then proceeded to "clarify" when and under what circumstances involvement by a passive owner would or would not impact on the integration proposal, depending on whether the activity was before or after the party became a passive one, before or after the application was filed, before of after something called the B List date, etc. etc. 5 FCC Rcd. at 2752-53 (¶¶15-16).

That was in April 1990. In November 1990 the Commission decided the Royce case. There, the so-called active party was inactive and the so-called passive party was very active, and at all levels of decision, the integration was rejected. However, the full Commission used this occasion to expound on its various and sundry concepts, including the Coast TV exposition only six months earlier, in dealing with questions of when passive parties will be deemed to be active parties, and vice versa. 5 FCC Rcd. at 7063-64 (¶¶8-10). As we understand this discussion, there are three levels of acceptance or non-acceptance of a two-tiered integration proposal, i.e., acceptance in full, acceptance in part or rejection in the entirety. The integration proposal is accepted in part (counting only the percentage of the total equity held by the active parties) (i) when a passive party is active after he or she was supposed to become a passive party, (ii) this is particularly a problem where an active party is aware of this activity and does not stop it, and/or, in what appears to be a separate category of offense, (iii) where an applicant "otherwise significantly disregards partnership or corporate formalities" Id. at 7064 (¶9). Integration is to be rejected in its entirety (i) where a party holding a small or passive interest is in a position to "dominate" the applicant's affairs, (ii) where a person who is not a party to the application is in a position to "exercise significant control" over the applicant or (iii) where a person supposedly an active party has exercised "little significant control" over the applicant Id. at 7064 (¶10).

That was in November 1990. The Evergreen decision was in 1991. It involved applications for an FM station in the Denver area. The ALJ granted the application of an entity which we shall call "Group Y," crediting it with 100% integration. The Review Board reversed, holding that "Group Y" was to be assessed zero integration. The Review Board granted the permit to another applicant, which we shall call "ERI," whose integration was credited at 51%, which was sufficient to win since no other applicant was credited with as much as 51% integration. The full

Commission reversed the Review Board relative to "Group Y" (recall, the Review Board had accorded "Group Y" zero integration, reversing the ALJ who had credited "Group Y" with 100% integration). The full Commission held that "Group Y" was entitled to 40% integration. This was not enough to win, so "Group Y" was history. The Commission also reversed the Review Board relative to its chosen winner, "ERI." Recall, the Review Board had awarded "ERI" 51% integration credit, which was sufficient to win since no other applicant had been credited an equal or greater percentage. The full Commission concluded that another applicant, who we shall call "ECC," was entitled to 100% integration credit. Since this exceeded "ERI's" 51%, "ERI" was history. The ultimate winner, "ECC," had been awarded 100% integration credit by the ALJ, was assessed zero integration by the Review Board, but then was restored to 100% integration credit by the full Commission.

In the Evergreen case, of eight applicants whose integration was compared, the ALJ credited two applicants with 100%, three applicants with partial but less than 100% and three applicants with zero integration; the Review Board credited no applicant with 100%, three applicants with partial but less than 100% and five applicants with zero integration; the full Commission credited one applicant with 100%, four applicants with partial but less than 100% and three applicants with zero integration. For determined readers, the texts explaining how these results were reached may be found at JA 35-72 (ALJ), 1 FCC Rcd. 1052 (Review Board) and 6 FCC Rcd. 5599 (full Commission).

C. Mrs. Bechtel has asserted that the FCC has never undertaken to study the effectiveness of the integration criterion, and the FCC has never responded to disclose the existence of any such study even though the criterion has been employed for some 45 years now.

In our brief in Bechtel v. FCC, JA 231-32, we asserted that the Commission has never conducted studies or developed empirical evidence to demonstrate that "integrated" ownership (structured in accord with FCC policies and case decisions), in fact, yields program service more attuned to the public interest than oversight of management by ownership operating in the marketplace guided solely by rational, public relations and business considerations -- as proposed by Mrs. Bechtel. Nor has the Commission ever conducted studies or developed empirical evidence to demonstrate that its "integration" criterion, in fact, has increased the level of broadcast station ownership in the hands of persons with local ties or women or minorities -- categories on which that criterion is premised. The Commission, to our knowledge, has not even made a readily available, simple statistical check on the actual length of time its "integrated" license winners have owned and operated their broadcast stations.

The brief which the government filed in Bechtel v. FCC, JA 175-210, is totally silent concerning this damning indictment of the FCC's lack of attention to a key regulatory policy. The FCC's first remand decision is also silent on this score. So is the FCC's second remand decision. And, in the current rulemaking notice (a time when the Commission often will recite and make available to commenting parties copies of staff studies pertinent to the rulemaking in question), although the FCC called for commenting parties to provide empirical evidence that they might have in their possession, there is no reference to any FCC studies of the matter.

While in our brief in Bechtel v. FCC, we indicated that the integration criterion dates back a quarter of a century to the 1965 Policy Statement, in the second remand decision, 8 FCC Rcd. at 1676 (¶15), the FCC cites and relies on earlier case precedent showing that the integration criterion dates as far back as 1947 and 1950. Thus, the Commission is attempting to defend a policy that is some 45 years old without any claim to having made studies of the efficacy of that policy during the near half century of its existence.

D. Mrs. Bechtel has provided an illustrative case history of the failure of the criterion in practice and has repeatedly invited the FCC and other parties to provide examples of "integration success stories"; the FCC's response to our illustrative case history makes no sense, and neither the FCC nor any party to this litigation or in the comments in the rulemaking proceeding has provided any examples of an "integration success story".

In our brief in Bechtel v. FCC, JA 228, we invited the Commission and opposing parties, in reply, to cite actual instances since the 1981-1982 time period[9] when an applicant which prevailed in a comparative hearing based upon its integration proposals actually constructed, owned and operated the broadcast station employing the integration proposals in the manner represented to the Commission for a period substantially exceeding one year. We

[9] The two-tiered structure for integration credit was given acceptance in 1981, Anax Broadcasting, Inc., supra, and the three-year rule was rescinded in 1982, Transfer of Broadcast Facilities, supra.

had extended such an invitation in our briefs filed at various levels with the FCC below. There never were any takers then.

There still are no "integration success stories" in this record. The FCC did not provide any in its appellee's brief in Bechtel v. FCC, JA 175-210, in its first remand decision, in its second remand decision or in its current rulemaking notice. The comments filed by industry and public parties in that rulemaking did not disclose a single "integration success story."

In our brief in Bechtel v. FCC, JA 228-29, we recited an illustrative case, involving an appeal to this Court, of the failure of the integration criterion. The Commission spent a number of years, and this Court heard and decided the appeal, in a case involving the application of Debra D. Carrigan, supra, for a new radio station in Las Vegas, Nevada. The Commission upheld Ms. Carrigan's integration proposal as the decisional factor under the comparative issue. Following the conclusion of that litigation which spanned a period of more than five years, Ms. Carrigan commenced operation of the station in April 1989 and within a period of five months, in August 1989, she contracted to sell the station for an immediate payment of $1,100,000 for a 49% interest with an option to acquire the remaining 51% at the end of the first year for an additional $3,100,000, or total consideration of $4,200,000. JA 228-29, 131-74. The buyer was a well-known and successful group broadcaster who has testified in another FCC proceeding that he does not employ the Commission's "integration" modus operandi; rather, he operates through paid managers at each station, not unlike the modus operandi proposed by Mrs. Bechtel. Id.

In the first remand decision, the FCC says two things about the Carrigan experience, neither of which excuses this clear breach and failure of the integration criterion. First, the FCC relies on the fact that the applicant did not have a two-tiered structure and therefore was not a product of the Anax doctrine. 7 FCC Rcd. at 4569 (n. 8). This begs the question. We never said the only time there is a problem with the integration criterion is when there is a two-tiered structure. The criterion is rife with faults and failings of which the Anax doctrine is only one, albeit a massive one.

Then, the FCC states that if its current one-year reporting requirement had only been in effect (to certify the presence of integration as promised on the first anniversary date after commencement of operation), Ms. Carrigan's action would have been reported and then appropriate action could have been taken by the Commission. Ibid. at 4569 (n. 9). This makes no sense whatsoever. Ms. Carrigan's action was reported, not at the end of the first year of operation, but even earlier, at the time, after only five months of operation, when she sold the 49% interest and contracted to sell the balance at the end of the first year. This was reported by letter to the FCC dated September 23, 1989 from Ms. Carrigan's counsel enclosing a copy of the contract of sale. JA 138-57. The Commission did nothing. It was "blind" to its obligation to have a meaningful policy in place to award permits in the public interest. No one at the Commission really cared when Ms. Carrigan sold out for $1 million down (and $3 million more to come later) before the end of a single year of operation.

We can cite another illustration of failure of the integration criterion involving an appeal before this Court, i.e., Cleveland Television Corporation v. FCC, 732 F.2d 962 (D.C.Cir. 1984). In that case, certain parties, who are minorities including one Hubert Payne, owned all of the voting stock and were committed to be integrated in the management of the station, whereas a local radio broadcaster (Malrite) held a substantial amount of equity in the form of nonvoting convertible preferred stock. In the comparative process with another applicant, this applicant prevailed on the strength of its integration proposal including Mr. Payne and his associates, which was fully credited without any dilution for the nonvoting convertible preferred stock held by Malrite. The FCC and this Court were quite specific in reliance on evidence that the Malrite group would be removed "from all future participation in decision-making on matters concerning the station's operations." 732 F.2d at 968.

The application was filed in 1978; the construction permit was granted in 1984 after six years of litigation. The station went on the air on May 19, 1985. Within a few days of one year later, on June 5, 1986, the parties filed an application with the FCC requesting transfer of a controlling 51% voting stock interest from the parties whose integration had won the permit (Mr. Payne and his colleagues) to the holder of the nonvoting convertible preferred